No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts. Public Citizen works on a wide range of issues, including enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in issues concerning the enforcement of mandatory predispute arbitration agreements, and it has appeared as amicus curiae in many cases involving such issues in this Court and other federal and state courts.

Public Citizen submits this brief to address one of the two issues raised by petitioner New Prime in its brief: whether, when a contract contains an arbitration provision including a clause delegating questions of "arbitrability" to an arbitrator, the Federal Arbitration Act (FAA) requires a court to compel arbitration of the issue whether the FAA even applies to the contract. The argument that a court must apply a statute without first determining that the statute applies to the case is so unusual that New Prime's own amici curiae hardly mention its argument on the point, and instead almost exclusively address the merits of the question whether the contract here is a contract of employment of a transportation worker to which the FAA does not apply. Both New Prime's

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for both parties have consented in writing to its filing.

brief and that of respondent Frank Oliveira likewise devote most of their attention to that merits question.

In arbitration cases, however, the question of who decides an issue—court or arbitrator—often plays a critical role. And although New Prime's argument—that the FAA requires a court to refer the issue of its own applicability to an arbitrator without first addressing a substantial argument that the Act does not apply to the contract containing the delegation clause the court is being asked to enforce—seems counterintuitive, a brief addressing it may assist the Court in reaching a decision that adds clarity to arbitration law and helps define the limits of the Court's rulings on the subject.

SUMMARY OF ARGUMENT

New Prime's lead argument in this case is that the FAA requires a court to order arbitration before the court has even found that the FAA applies. But no statute can dictate the outcome of an issue in a case in which the statute does not apply. Justice Scalia expressed the point succinctly: "If a provision of law is 'inapplicable' then it cannot be applied." *Republic of Iraq v. Beaty*, 556 U.S. 848, 864 (2009).

The FAA itself makes plain that it provides no occasion for an exception to this common-sense principle: It states that "nothing" in the FAA "shall apply to contracts of employment of ... workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Thus, the FAA's basic provision that an arbitration provision "in ... a contract evidencing a transaction involving commerce" is "valid, irrevocable, or enforceable," 9 U.S.C. § 2, *does not apply* if the "contract" containing the arbitration provision is a contract of employment of an interstate or foreign commerce worker.

Moreover, this Court has long held that the FAA's procedural provisions requiring courts to stay litigation pending arbitration and to compel parties to arbitrate, 9 U.S.C. §§ 3 & 4, apply only to arbitration agreements made enforceable by section 2. Thus, the FAA does not require a court to compel arbitration under an arbitration provision contained in a contract of employment falling within section 1's exclusion.

Accordingly, before compelling arbitration under the FAA, a court must, if the matter is disputed, determine whether the contract that includes the arbitration provision sought to be enforced is a contract of employment of a worker engaged in interstate or foreign commerce—a phrase that this Court has held refers to workers engaged in interstate or foreign transportation. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). If the contract falls in that category, the FAA has nothing to say about whether an arbitration provision in the contract must be enforced.

In this case, therefore, it is up to the courts, not an arbitrator, to decide whether the contract containing the arbitration agreement New Prime seeks to enforce is a contract of employment of a transportation worker. If, as respondent Oliveira's brief demonstrates, it is such a contract, the FAA does not require enforcement of *any* arbitration provision it contains—including a provision calling for arbitration of whether a dispute is subject to arbitration.

New Prime's contrary assertion rests on its view that the FAA requires that the question of its own applicability be arbitrated under a "delegation" clause in the arbitration provision at issue, which calls for arbitration of disputes about whether a specific matter is subject to arbitration. But as this Court has

held, a delegation clause is only a form of arbitration agreement under the FAA. Thus, the FAA does not apply to the clause if it is within a contract of employment of a transportation worker, any more than the Act applies to any other arbitration agreement contained in such a contract.

New Prime seeks to avoid this conclusion by invoking the principle that arbitration agreements, including delegation clauses, are "severable" from the contracts that contain them. New Prime's reliance on the severability principle is misplaced, however, because that principle is applicable to determinations of the *validity* of arbitration provisions, not of whether they are subject to the FAA. The doctrine provides no basis for overriding the FAA's express language rendering its requirements inapplicable to an arbitration provision contained in a contract of employment of a transportation worker.

ARGUMENT

I. The FAA cannot, and does not, require a court to enforce any arbitration agreement unless the court determines that the FAA applies to that agreement.

At issue in this case is whether the FAA requires arbitration of the dispute between New Prime and respondent Dominic Oliveira over whether New Prime's compensation of its truck drivers violated federal and state minimum wage laws. That issue requires the Court to resolve two subsidiary issues: whether the FAA requires that the courts refer to an arbitrator the question whether the FAA applies to this case; and, if not, whether this case involves a contract of employment of a worker engaged in interstate commerce, rendering the FAA inapplicable.

Because New Prime has rested its arguments on both issues solely on the FAA, the Court's resolution of the "who decides" question, like its resolution of the ultimate question of the FAA's application to the contract at issue in this case, depends on the text of the FAA. Consideration of the question "starts 'where all such inquiries must begin: with the language of the statute itself.'" *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018) (quoting *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011)). Here, as is often the case, "the statutory text is enough to resolve" the question. *Pereira v. Sessions*, 138 S. Ct. 2105, 2114 (2018). The language of the FAA unambiguously forecloses the argument that the FAA requires arbitration of any issue—including that of its own application—in any case where the arbitration provision a party seeks to enforce is found in a contract of employment of a transportation worker.

As pertinent here, the FAA expressly makes an agreement to arbitrate a dispute enforceable if it is set forth as "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2.[2] As this Court has put it, to be enforceable under the FAA, an arbitration agreement "*must* be part of a written maritime contract or a contract 'evidencing a transaction involving commerce.'" *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984) (emphasis added). In other words, by its

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[2] Section 2 also provides for enforceability of an agreement in writing to arbitrate "an existing controversy arising out of" a maritime transaction or contract evidencing a transaction in interstate commerce. Such a post-dispute arbitration agreement is not at issue here.

plain terms, the FAA's enforcement mandate applies only to arbitration provisions "in certain classes of contracts." *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 200 (1956).

Section 1 of the FAA provides an additional limit on the applicability of any requirement under the Act that an arbitration provision be enforced. Section 1 begins by defining the terms "maritime transactions" and "commerce" that are critical to the scope of section 2's enforceability mandate, and goes on to say, "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

Section 1's provision that nothing in the Act shall apply to the specified "contracts of employment" links directly with section 2's language making arbitration provisions "in" certain "contracts" enforceable. The obvious meaning of section 1 is that section 2's requirement that an arbitration provision in a contract involving commerce be enforced shall not apply to a provision in a contract of employment of a worker engaged in interstate or foreign commerce. Thus, section 2 does not make an arbitration provision enforceable if it is in one of the contracts of employment described in section 1.

Section 1 likewise renders sections 3 and 4 of the FAA, which authorize courts to stay litigation and compel arbitration of disputes subject to arbitration agreements, inapplicable to arbitration provisions in contracts of employment of interstate commerce workers. Invoking these sections of the FAA to require arbitration under a provision in a contract of employment falling within section 1 would "apply"

the FAA to such a contract, contrary to section 1's express command.

Accordingly, this Court has long held that sections 3 and 4 apply only to arbitration agreements that are enforceable under section 2. In *Bernhardt*, this Court recognized that "Sections 1, 2, and 3 are integral parts of a whole. ... [Sections] 1 and 2 define the field in which Congress was legislating. ... [Section] 3 reaches only those contracts covered by [sections] 1 and 2." 350 U.S. at 201–02. And in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), the Court made clear that section 4 similarly provides only a means of enforcing agreements falling within the scope of section 2's enforceability rule. *See id.* at 400–04. Because section 1 takes the contracts of employment to which it applies outside section 2's rule that an arbitration provision in a contract involving commerce is enforceable, it necessarily renders the procedural enforcement mechanisms of sections 3 and 4 inapplicable as well.

This Court's decisions have recognized this straightforward and obvious reading of the statute. In *Southland*, for example, the Court noted that section 1's language making the FAA inapplicable to the specified contracts of employment effectively limited the definition of "commerce" that in turn defines the scope of section 2's enforcement mandate. *See* 465 U.S. at 11, n.5. The Court recognized the point even more explicitly in *Circuit City*, which held that the term "workers engaged in foreign or interstate commerce" applies only to transportation workers. 532 U.S. at 119. Pervading the Court's opinion was recognition that section 1 is an "exclusion provision" providing an "exemption from [the FAA's] coverage,"

532 U.S. at 112, for arbitration agreements contained in the contracts of employment to which it applies. Thus, as the Court put it, "Section 1 *exempts from the FAA* ... contracts of employment of transportation workers." *Id.* at 119 (emphasis added).

It follows that, before applying the FAA to order that an issue be arbitrated, a court must resolve any dispute over whether the FAA applies to the contract containing the arbitration provision at issue. Absent such a determination, the FAA neither requires nor authorizes the court to enforce an arbitration provision. Thus, this Court has consistently recognized that whether the FAA is applicable to a contract is a "threshold" question antecedent to whether a court must order a party to arbitrate under the Act. *Bernhardt*, 350 U.S. at 200; *see, e.g.*, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273–82 (1995); *Southland*, 465 U.S. at 11; *Prima Paint*, 388 U.S. at 401.

The requirement that a court decide whether the contract at issue is excluded from the FAA's coverage by section 1 before ordering arbitration of any issue (including the section 1 issue itself) is critical, because any order compelling arbitration under the FAA is necessarily applying the FAA to give effect to a purported agreement to arbitrate. A court may not apply the FAA where the FAA itself provides that it is inapplicable. "[T]o 'apply' a statute is '[t]o put [it] to use,'" *Beaty*, 556 U.S. at 864, and invoking the FAA to require arbitration undeniably puts the statute to use—which a court "cannot" do when "a provision of law is 'inapplicable.'" *Id.*

This Court has insisted that when Congress says a law "shall not apply" in specified circumstances, the

courts must take Congress at its word and decline to apply it, because "Congress says what it means and means what it says." *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1847–48 (2016). And interpreting a statute to apply where it says it does not apply is "a reading most unnatural." *Levin v. United States*, 568 U.S. 503, 514 (2013). Holding that the FAA requires a court to enforce an agreement to arbitrate without first determining whether the FAA excludes the case from its application would accept just such an unnatural reading.

II. New Prime's invocation of its delegation clause and the principle of "severability" cannot justify application of the FAA to a contract to which the FAA does not apply.

New Prime's counterintuitive assertion that the FAA can require a court to compel arbitration without first determining that the FAA applies rests on its assertion that its arbitration agreement contains a "delegation" clause requiring arbitration of issues of "arbitrability." In New Prime's view, that clause encompasses even the threshold question whether the FAA applies at all. In arguing that the FAA requires arbitration of its own applicability under the delegation clause, New Prime effectively asserts that a court must apply the FAA to a contract containing a particular type of arbitration provision—a delegation clause—even where the FAA is inapplicable to the contract. New Prime's assertion runs counter to both the text of the statute and this Court's precedent, under which a delegation clause cannot by its mere existence require its own enforcement if the FAA does not apply to the contract containing it.

As this Court held in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), a delegation clause is nothing more than a specialized type of arbitration provision: one that requires arbitration concerning the applicability or validity of the arbitration provision of which it is a part (in the same way that that arbitration provision may in turn require arbitration concerning the applicability or validity of the contract of which it is a part). *Id.* at 68–70. Critically, *Rent-A-Center* explained that "the FAA operates on this additional arbitration agreement just as it does any other," *id.* at 70, so that it is enforceable under the FAA if (and only if) section 2 of the Act requires its enforcement. *See id.*

By its plain language, the way the FAA "operates on" the delegation clause, as it does on any other arbitration provision, is to require its enforcement only if it is a provision "in … a contract evidencing a transaction involving commerce," 9 U.S.C. § 2, and only if the application of section 2 and other parts of the FAA to that contract is not precluded by section 1 because the contract is a contract of employment of a transportation worker. There is no dispute that the delegation clause New Prime seeks to enforce is a provision "in" the contract that Mr. Oliveira contends is a contract of employment of a transportation worker. Thus, whether the FAA requires the court to enforce the delegation clause and order the parties to arbitrate questions of "arbitrability" under it depends on whether the contract in which the clause is found is a contract of employment under section 1's exclusion clause. The FAA cannot require a court to order arbitration under the delegation clause unless the court first makes that determination, on which the applicability of the FAA depends.

New Prime wrongly insists that whether the FAA requires enforcement of its delegation clause must be determined without regard to the nature of the contract in which it is set forth because of the principle of "severability." Under that doctrine, the *validity* of an agreement to arbitrate (including a delegation clause) is treated as a separate question from that of the larger contract of which it is a part. *See Rent-A-Center*, 561 U.S. at 70–71; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444–46 (2006); *Prima Paint*, 388 U.S. at 402–04. Thus, unless its own validity is specifically challenged, an arbitration provision may be enforceable even if the contract of which it is a part is invalid, and a party may therefore be required to arbitrate its challenge to the validity of the contract as a whole. *See Rent-A-Center*, 561 U.S. at 71; *Buckeye*, 546 U.S. at 444–45; *Prima Paint*, 388 U.S. at 404. The Court's treatment of delegation clauses as specialized arbitration provisions severable from the larger arbitration provisions of which they are a part means that a valid delegation clause may require arbitration of the validity of the arbitration provision as a whole. *Rent-A-Center*, 561 U.S. at 71–72.

These principles, however, do not assist New Prime because the severability doctrine has a statutory basis that limits it to challenges to the enforceability and validity of an arbitration clause; it does not encompass disputes over whether the FAA applies at all. As the Court explained in *Rent-A-Center*, the severability doctrine is based on the language of section 2 of the FAA, which makes an arbitration provision that is subject to the FAA "'valid, irrevocable and enforceable' *without mention* of the validity of the contract in which it is contained." 561 U.S. at 70. This language, as the Court has explained, requires sever-

ability specifically of "validity" issues, which are different from other prerequisites to application of the FAA, such as whether a contract containing an arbitration provision was ever formed. *Rent-A-Center*, 561 U.S. at 71, n.2; *Buckeye*, 546 U.S. at 444, n.1. This Court has applied the severability principle only to validity issues.

For example, the Court's decisions teach that the severability doctrine does not apply to the fundamental question whether the parties have entered into a contract containing an arbitration provision. The FAA provides for enforcement of an arbitration provision only if it is in a "contract," 9 U.S.C. § 2, and the existence, though not the validity, of that contract is a prerequisite to any application of the FAA, which is always "a matter of contract between the parties." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Thus, the Court in both *Rent-A-Center* and *Buckeye* specifically noted that it was not holding that the severability principle applies to the issue whether a contract exists at all. *See Rent-A-Center*, 561 U.S. at 71, n.2; *Buckeye*, 546 U.S. at 444, n.1.

Confirming this limitation on the severability holdings of *Rent-A-Center* and *Buckeye*, the Court held in *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287 (2010), that a court must "always" decide whether the parties entered into the agreement to arbitrate, *id.* at 297, 301—an issue that will typically be the same as the question whether they entered into the contract of which the arbitration provision is a part, *see id.* at 303 (noting that formation of the arbitration agreement at issue depended on formation of the collective bargaining agreement in which it was found). The severability

principle, the Court held, does not apply where a party claims the agreement to arbitrate was never concluded, *id.* at 301—a claim that will almost always be based on a dispute over whether the party entered into the contract containing the arbitration agreement, because a party who has not agreed to *anything* cannot have agreed to arbitrate. *See, e.g., Janiga v. Questar Capital Corp.*, 615 F.3d 735, 741–42 (7th Cir.), *cert. denied*, 562 U.S. 1110 (2010).

New Prime wrongly asserts that in *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017), this Court held that the FAA applies even to "determining whether an arbitration agreement *exists*." Pet. Br. 15. But in *Kindred*, this Court held only that a state may not adopt rules of contract formation that discriminate against the validity of arbitration agreements. It did not remotely suggest that the FAA could allow enforcement of an arbitration provision against someone who did not enter into an agreement with a provision requiring arbitration. *See* 137 S. Ct. at 1428–29. Similarly unsupported is New Prime's suggestion that a court can use a delegation clause to require a party to arbitrate whether it is bound (for example, under third-party principles) by an arbitration provision in the absence of assent to the contract in which it is found. Pet. Br. 14. Read in context, the passage from *Rent-A-Center* quoted by New Prime did not address that issue; there, the Court commented only on the scope of what parties "can *agree* to arbitrate." *See Rent-A-Center*, 561 U.S. at 68. New Prime also cites appellate authority predating *Granite Rock*, but the cases postdating that decision have held that a court must decide the basic question whether a party is bound to arbitrate anything, including arbitrability, under a contract. *See,*

e.g., *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1127 (9th Cir.), *cert. denied sub nom. Toyota Motor Corp. v. Choi*, 571 U.S. 818 (2013).

Just as a court cannot separate the enforcement of an arbitration provision from a determination of whether the parties are bound by that provision, the statutory text forecloses any argument that a court can separate its decision whether to enforce an arbitration provision—including a delegation clause—from a determination of whether the FAA applies to the contract of which it is a part. Section 2 precludes application of a "severability" analysis to this issue by making the application of the Act to an arbitration provision entirely dependent on the nature of the contract of which it is a part: That larger contract must be one "evidencing a transaction involving commerce." And section 1 specifically excludes contracts of employment of transportation workers from the contracts involving commerce whose arbitration provisions are enforceable through the application of section 2. *See supra* pp. 5–8.

Thus, sections 1 and 2, together, *require* that a court look to the nature of the contract containing an arbitration provision, rather than solely at the arbitration provision itself, in determining whether the FAA applies. And because the FAA cannot require arbitration of anything (even under a delegation clause) if it does not apply, a court must necessarily resolve any issue over whether an arbitration provision (including a delegation clause) is in a contract of employment subject to section 1 before it can be required to enforce the arbitration provision.

Not only does New Prime's contrary contention contradict the clear statutory text, but accepting that

argument would mean that section 1's exclusion of employment contracts of transportation workers would never have any effect. New Prime observes that a delegation clause or other arbitration provision "is not *itself* a 'contract of employment.'" Pet. Br. 15. But if section 1 bars application of the FAA only to contracts of employment as such, and not to the arbitration provisions they contain, then it excludes *nothing* from the FAA. Even without the exclusion, the FAA would not provide for enforcement of contracts of employment in and of themselves. Reading the exclusion to exclude nothing would not only violate the fundamental canon of statutory construction against reading a law to make part of it "inoperative or superfluous," *Corley v. United States*, 556 U.S. 303, 314 (2009), but would also be wholly contrary to this Court's decision in *Circuit City*, which was premised on the understanding that the meaning of section 1 determines the scope of the FAA's application to *arbitration provisions* in contracts of employment. *See* 532 U.S. at 119.

Revealing its fundamental misunderstanding of the severability doctrine it invokes, New Prime suggests that it matters little whether its position undermines the limits on the FAA's scope set by sections 1 and 2 because, it asserts, applying the severability doctrine always has a similar effect: According to New Prime, "[t]hreshold arbitrability issues are *always* questions that go to the court's authority to compel arbitration under the FAA—if they are decided against the party seeking to compel arbitration, then there is no enforceable arbitration agreement and the FAA is inapplicable." Pet. Br. 12. That assertion gets this Court's holdings in *Rent-A-Center*, *Buckeye*, and *Prima Paint* precisely backwards. The holding of

those cases is that when a court orders arbitration of the validity of a contract under an arbitration provision contained in that contract—or arbitration of the validity of an arbitration provision under a delegation clause contained in the provision—the court is determining that there is a *valid* and enforceable arbitration provision that is subject to the FAA and that requires arbitration of the matter in question.

Thus, in each of the examples cited by New Prime (at 13), the courts determined that the issue as to which arbitration was compelled was the subject of a valid arbitration provision enforceable under the FAA; the validity of the agreement to arbitrate that issue did not, as New Prime suggests, depend on the outcome of the arbitration. Indeed, if an arbitration provision, including a delegation clause, is not itself valid, a court *cannot* enforce it: The court "must consider" a challenge to the validity of any agreement to arbitrate (including a delegation clause) "before ordering compliance with that agreement." *Rent-A-Center*, 561 U.S. at 71.

By the same token, before ordering compliance with any arbitration provision, a court must consider both whether a party assented to the contract of which it is a part and whether the FAA applies to that contract. The difference between those inquiries and the validity inquiry is that they necessarily involve consideration of the existence and nature of the larger contract containing the arbitration provision, whereas, under *Prima Paint* and its progeny, the *validity* of the arbitration provision is a separate question from the validity of the contract in which it is embedded. That difference is a result of the statutory language that makes the question of the FAA's applicability in-

separable from the nature of the contract containing an arbitration provision.

Even where the severability principle applies, moreover, it does not provide, as New Prime wrongly suggests, that an arbitration provision cannot be invalid for a reason that may *also* apply to the agreement of which it is a part. As long as the ground of invalidity applies to the arbitration provision directly, it may also apply to other provisions of the contract, or the contract as a whole. *See MacDonald v. CashCall, Inc.*, 883 F.3d 220, 226–27 & n.5 (3d Cir. 2018) ("In specifically challenging a delegation clause, a party may rely on the same arguments that it employs to contest the enforceability of other arbitration agreement provisions.") (citing *Rent-A-Center*, 561 U.S. at 74). The Court need not address this point here because of the inapplicability of the severability principle to section 1. If that principle did apply, however, it would still allow a court to follow the plain meaning of section 1 and hold a delegation provision to be outside the FAA for the same reason that the arbitration provision of which it is a part is outside the FAA: *i.e.*, that both provisions are in a contract of employment of a transportation worker to which the FAA does not apply.

New Prime insists that the argument that a court can apply the FAA only if it determines that the contract at issue is one to which the FAA applies is "circular." Pet. Br. 12. A more accurate characterization of the point that a law that is inapplicable cannot be applied might be that it is a truism—but as shown by Justice Scalia's expression of the point in *Beaty*, 556 U.S. at 864, it is a truism that is in fact true and often, as in this case, outcome-determinative. In contrast, New Prime's position, that a nested series of

arbitration provisions in a contract not subject to the FAA can bootstrap themselves into the FAA's aegis, is supported by neither the statute, this Court's cases, nor logic. No matter how many Russian-doll arbitration provisions exist in a contract, the FAA cannot require a court to enforce any of them if the contract is excluded from the FAA. And by its express terms, the FAA does not apply to any arbitration provision that is in a contract of employment of a transportation worker within the meaning of section 1 of the FAA.

Whether the contract in this case falls into that category is, therefore, necessarily an issue for a court to decide.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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